

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID WAYNE BRISTOW,

Petitioner,

No. CIV S-00-2546 GEB JFM P

vs.

C. TERHUNE, Director, CDC,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1997 conviction on charges of assault with intent to commit forcible oral copulation, false imprisonment by violence, forcible oral copulation, rape by a foreign object, forcible rape, and attempted forcible rape. Petitioner claims that his constitutional rights were violated when the trial court abused its discretion by permitting the prosecution to introduce evidence of uncharged prior offenses and by failing to grant petitioner a new trial due to juror misconduct.

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PROCEDURAL HISTORY

On November 14, 1996, the state filed an information charging petitioner with assault with intent to commit forcible oral copulation, false imprisonment by violence, forcible oral copulation, rape by a foreign object, forcible rape, and attempted forcible rape. Petitioner was tried in the San Joaquin County Superior Court on January 6, 1997. (CT 75-77.) The jury returned a guilty verdict on February 25, 1997. (CT 189-223.)

Petitioner filed a motion for new trial in the San Joaquin County Superior Court on April 28, 1997. (CT 378-79.) The affidavit of Juror No. 8 was appended to that motion. (CT 382.) Petitioner's motion for new trial was denied on May 12, 1997. (CT 383.)

Petitioner appealed his conviction to the Court of Appeal for the State of California, Third Appellate District, and on April 20, 2000, petitioner's conviction was affirmed. Petitioner filed a petition for review to the California Supreme Court, which was denied on June 28, 2000.

FACTS¹

At approximately 10 p.m. on October 9, 1996, [petitioner] and his brother-in-law, Larry Bowles, solicited Rosanna Abat and her daughter, Isabelle Mendoza, for acts of prostitution for \$40. The two women schemed to take the money without performing the negotiated sex acts, an activity they referred to as "ganking." The four of them drove over to an apartment complex on Maple Street, where the women told [petitioner] and Bowles to wait in the truck until they got a room and returned. Abat and Mendoza hid in the laundry room, where they encountered 18-year-old Crina and her 15-month-old son. Crina is Abat's daughter-in-law and Mendoza's sister-in-law.

[Petitioner] and Bowles eventually found the women, who pretended they were hiding from Mendoza's abusive boyfriend. [Petitioner] saw 16-year-old Lyndsay sleeping outside the laundry room. Mendoza and Abat then left with [petitioner] and Bowles to go to another apartment. When they arrived, the two women got into the car with Mendoza's boyfriend and drove away.

¹ The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v. Bristow, No. C026756, a copy of which is attached as Exhibit B to Respondent's Answer, filed February 16, 2001.

1 [Petitioner] and Bowles eventually met up with their wives.
2 [Petitioner] and his wife returned to the laundry room at the Maple
3 Street apartment complex to look for Abat and Mendoza. While
4 his wife waited in the truck, [petitioner] confronted Crina and
5 asked if she had seen the women. After Crina denied having seen
6 them since they left, [petitioner] ordered her to get on her knees
7 and orally copulate him, threatening to hurt her if she did not
8 comply. Although Crina was afraid, she refused to perform the act.
9 [Petitioner] asked Crina if Lyndsay engaged in prostitution, and
10 Crina replied that she did not.
11

12 After [petitioner] left the laundry room, Crina used her eyeliner to
13 write his license plate number on a washing machine. She then ran
14 upstairs to a vacant apartment where Lyndsay had gone to continue
15 sleeping. Crina awakened Lyndsay and told her that Abat and
16 Mendoza had ganked [petitioner], that Crina had almost been raped
17 by him, and that she wanted to leave immediately. Lyndsay
18 declined to leave because it was cold outside and she did not want
19 to get picked up for a curfew violation. After checking to see if the
20 doors were locked, Lyndsay, Crina, and her baby went to sleep in
21 the apartment.
22

23 Crina and Lyndsay were awakened when [petitioner] opened the
24 bedroom door. They asked how he got in the apartment and what
25 he was doing there. [Petitioner] said he had a key to the apartment
26 and was looking for Abat and Mendoza. [Petitioner] left after the
girls asked him to go.

Crina and Lyndsay were awakened later when [petitioner] opened
the bedroom door holding a large kitchen knife. He threatened to
hurt them and Crina's baby if they did not do what he wanted.
Lyndsay and Crina began crying, but did not resist for fear
[petitioner] would hurt them or the baby. [Petitioner] incapacitated
Crina by putting electrical tape around her mouth, hands, and
ankles.

[Petitioner] ordered Lyndsay to take off her pants and shoes,
whereupon he taped her mouth and taped her wrists behind her
back so tightly that it cut off her circulation. He then led Lyndsay
at knife point to his truck, where he made her lie down in the front
seat. During a 10-minute drive, [petitioner] stuck his finger into
Lyndsay's vagina twice. Lyndsay told [petitioner] she was 15,
although she was really 16.

When [petitioner] stopped the truck, he took off Lyndsay's
underwear and taped her eyes. He walked her over to a different
area, unzipped his pants, stated he was going to rape her, and
demanded that she orally copulate him. When Lyndsay refused,
[petitioner] punched her in the face. Lyndsay orally copulated
[petitioner], who then raped her, but withdrew after about two
minutes to shift her before he penetrated her again. [Petitioner]

1 lost his erection and forced Lyndsay to orally copulate him once
2 more. [Petitioner's] penis continually became limp and fell from
3 Lyndsay's mouth whereupon he would curse and yell. Each time
she was able to speak, Lyndsay would ask to be taken home, but
[petitioner] did not respond to her pleas.

4 After about an hour, [petitioner] moved Lyndsay to a different
5 location a short distance away, tied her to a metal seat and forced
her to sit there and orally copulate him for several hours.
6 [Petitioner's] penis continually fell from Lyndsay's mouth and,
when she let out a big sigh, [petitioner] struck her. He threatened
7 to kill her if she bit him, and to hit her every time his penis fell out.
One time, [petitioner] became erect and attempted, without
8 success, to have intercourse.

9 [Petitioner] left for about 15 minutes. Upon returning, he was
10 angered to see that Lyndsay had tried to escape. He told her he was
going to shave her vaginal area to make it easier for him to
penetrate her. When Lyndsay advised [petitioner] that the problem
11 was not her hair but that he was not hard, he hit her again.

12 [Petitioner] shaved Lyndsay and made her orally copulate him
again. He refused to loosen her hands, which were swollen and
13 hurt. After people started arriving to work nearby, [petitioner] told
Lyndsay he was going to take her out of town. Lyndsay thought
14 she was going to die. [Petitioner] gagged her, pulled her T-shirt up
over her head, threw her to the ground, and tied her ankles to her
15 wrists behind her back. He started putting objects over her, and
everything got dark.

16 During the sexual assault on Lyndsay, Crina managed to free the
tape from her feet and walk to a neighbor's apartment. Rafael
17 Trujillo opened his door to find Crina with several pieces of
electrical tape wound all the way around her head, covering her
18 mouth. Her arms were tied behind her back with rope and
electrical tape. She looked frightened, desperate, nervous and on
19 the verge of tears. Trujillo freed her hands, and Crina removed the
tape from her mouth. Because Trujillo did not have a telephone,
20 Crina went to a nearby market to call the police.

21 When the police arrived, Crina was excited and crying. She
reported what had happened and told officers that she had written
22 [petitioner's] license plate number in the laundry room. Officer
Nies went to the laundry room, called the license number into
23 police dispatch, and learned the truck was registered to an address
on North Sacramento Street in Lodi. Nies proceeded to that
24 address, saw [petitioner's] truck parked there, and radioed Officer
Cunningham, who was proceeding to the area.

25 After Officer Cunningham and other officers arrived, Cunningham
26 observed [petitioner] heading for his truck and arrested him. The

1 officers began searching the compound for Lyndsay. Officer
2 Murray approached [petitioner], who was sitting in a patrol car,
3 and asked him where Lyndsay was. [Petitioner] replied, "I don't
4 know nothing about no girl." Officer Murray was positive that
5 [petitioner] never told him he had been in the back of the
6 compound with a hooker.

7 Lyndsay was discovered buried under a tent and used tires. She
8 was hog-tied, gagged and blindfolded, nude from the waist down,
9 and had a T-shirt pulled up over her head. She had electrical tape
10 and wire wrapped so tightly on her wrists, mouth and ankles, that
11 the officers could not use a knife to remove it for fear of cutting
12 her. The tape around her throat was tight enough to restrict the
13 flood of blood and affect her breathing. Lyndsay repeatedly
14 thanked the officers for rescuing her.

15 (People v. Bristow, slip op. at 2-7.)

16 TRIAL TESTIMONY

17 At trial, petitioner testified in his own defense. The state court described
18 petitioner's testimony concerning what happened on October 9, 1996:

19 [Petitioner] and his wife had an open relationship such that she did
20 not object to his paying a prostitute for oral sex. He told his wife
21 about what had happened earlier in the evening with Abat and
22 Mendoza. She wanted [petitioner] to get the money back, so they
23 drove to the Maple Street apartment complex.

24 When [petitioner] arrived at the complex, he told Crina that he
25 knew she had participated in the ganking ruse and demanded that
26 she either give him the money back or orally copulate him. Crina
27 refused to do so, but said that her friend Lyndsay would and that
28 she was into sadomasochistic bondage. Crina said [petitioner]
29 could tie her up and she would watch Lyndsay and [petitioner]
30 engage in sex, but did not want to participate herself. Crina gave
31 him the number of the vacant apartment at which she and Lyndsay
32 were staying.

33 [Petitioner] dropped off his wife and returned to the apartment. He
34 brought rope and electrical tape, which he anticipated using for
35 bondage, and he brought a steak knife to cut the rope. [Petitioner]
36 entered the unlocked front door of the apartment and walked into
37 the bedroom. Crina gestured for [petitioner] to leave, so he did so
38 for a short period of time.

39 [Petitioner] returned to the apartment and asked Lyndsay if Crina
40 had told her about the arrangement regarding oral sex and bondage.
41 Lyndsay said she was agreeable to performing the acts and did not

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1 indicate any unwillingness. He denied ever displaying the knife in
2 a menacing way or threatening to hurt anyone.

3 [Petitioner] decided he would prefer to have sex with Lyndsay
4 somewhere else because they were using the apartment illegally
5 and because he felt uncomfortable with Crina's baby there. He
6 also had second thoughts about whether it was appropriate for
7 Crina, who [petitioner] thought was a minor, to participate.
8 According to [petitioner], Crina said she was 17 years old and he
9 thought Lyndsay was 18 years old.

10 Lyndsay agreed to take a ride with [petitioner]. While she was in
11 the truck, she spread her legs without being asked. [Petitioner]
12 fondled her and inserted his finger in her vagina, without any
13 objection from Lyndsay. When they reached North Sacramento
14 Street, where [petitioner] worked as a mechanic, he asked Lyndsay
15 if he could blindfold her because he could not let her see how he
16 opened the gate to his workplace. He taped her mouth because he
17 was "just playing" as part of the bondage. They got into a car,
18 where [petitioner] fondled Lyndsay and she orally copulated him.
19 When he got an erection, Lyndsay straddled him for intercourse.
20 [Petitioner] stopped as his penis started to enter her, saying that
21 was not what he wanted. Lyndsay, who was willing to do whatever
22 [petitioner] wanted, said there was not enough room in the car for
23 anything else.

24 [Petitioner] took Lyndsay into a tent, where he taped her hands
25 because he thought that was part of the bondage sex she wanted.
26 [Petitioner] asked Lyndsay if she wanted to be struck as part of the
somasochistic sex. Because he thought she nodded her head, he
struck her lightly with his open hand. [Petitioner] admitted that his
limp penis sometimes fell out of Lyndsay's mouth, but denied
telling her he was going to hit her each time that it did.

According to petitioner, Lyndsay never asked to be taken home but
instead suggested they return to the apartment to finish their sex
acts. It was her suggestion to shave her pubic hair. After doing so,
he rebound her to resume their bondage sex acts. Lyndsay orally
copulated [petitioner] from several different positions, but he was
unable to get an erection. She began cussing and said, "That's it."
[Petitioner] was frustrated and grabbed her T-shirt, pulling it up
over her head. He left her under the tent, face down, with her
hands tied behind her back and the shirt above her head. He
thought she could free herself relatively easily because he had not
bound her tightly.

[Petitioner] got into his truck, started the engine, and then changed
his mind about leaving Lyndsay bound. He walked back through
the gate but when he heard the guard dog next door bark, he
thought his truck might be rolling and ran back towards it, at which
point the police took him into custody.

1 When Officer Murray told [petitioner] he was concerned about a
2 missing 16-year-old girl, [petitioner] responded that he did not
3 know anything about a 16-year-old girl, but that he had been in the
back with a hooker. [Petitioner] admitted he did not tell the police
that Lyndsay agreed to participate in bondage sex.

4 [Petitioner] denied ever molesting Sarah or Brandy and claimed
5 that Sarah's grandmother, who became her legal guardian in 1994,
had threatened to use Sarah to get even with him.

6 (People v. Bristow, slip op. at 8-11.)

7 ANALYSIS

8 I. Standards for a Writ of Habeas Corpus

9 Federal habeas corpus relief is not available for any claim decided on the merits in
10 state court proceedings unless the state court's adjudication of the claim:

11 (1) resulted in a decision that was contrary to, or involved an
12 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the
State court proceeding.

15 28 U.S.C. § 2254(d).

16 Under section 2254(d)(1), a state court decision is "contrary to" clearly
17 established United States Supreme Court precedents if it applies a rule that contradicts the
18 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially
19 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different
20 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406
21 (2000)).

22 Under the "unreasonable application" clause of section 2254(d)(1), a federal
23 habeas court may grant the writ if the state court identifies the correct governing legal principle
24 from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the
25 prisoner's case. Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ
26 simply because that court concludes in its independent judgment that the relevant state-court

1 decision applied clearly established federal law erroneously or incorrectly. Rather, that
2 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63,
3 123 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent
4 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

5 The court looks to the last reasoned state court decision as the basis for the state
6 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court
7 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal
8 habeas court independently reviews the record to determine whether habeas corpus relief is
9 available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

10 II. Petitioner’s Claims

11 A. Uncharged Offenses Admitted as Propensity Evidence

12 Petitioner contends that the trial court abused its discretion by failing to exclude
13 the testimony of his stepdaughter, Sarah, and her friend, Brandy, concerning several incidents
14 that allegedly occurred in the summer of 1993. Petitioner contends their testimony was of
15 limited probative value because the prior conduct was not similar to the charged offenses, and the
16 prejudice to petitioner was extreme based on the ages of the young children. Petitioner notes the
17 uncharged offenses were offenses with children under 12; the instant offense was with a person
18 older than 12. Petitioner also argues that the admission of this evidence was also highly
19 inflammatory given that society views child molesters as odious.

20 Respondent argues that the trial court did not infringe on petitioner’s rights to due
21 process and a fair trial because the trial court carefully weighed the prejudice versus the probative
22 value of the evidence after a lengthy hearing in limine and properly admitted the evidence under
23 California Evidence Code § 352. Respondent contends this evidence was highly probative to
24 bolster the credibility of Crina and Lyndsay, which petitioner tried to impeach by comparison to
25 Rosanna and Isabella, who were prostitutes and crack cocaine users, and to show that petitioner
26 had the propensity to commit sex crimes against female children.

1 The state court described the trial testimony concerning this claim as follows:

2 At trial, the court permitted the prosecution to introduce evidence
3 of prior uncharged sexual offenses committed by [petitioner]. His
4 [step]daughter, Sarah, and her friend, Brandy, testified about
5 sexual offenses [petitioner] had committed against them about
6 three years earlier, when Brandy was ten years old and Sarah was
7 six or seven years old. On one occasion, while Brandy and Sarah
8 were using a wading pool, [petitioner] entered the pool wearing his
9 underwear, reached under Sarah's swimsuit, and touched her chest.
He warned the girls that he would hurt them if they told anyone
about the touching. Another time, he got in the pool with them
while he was naked. On another occasion, he sat next to Brandy in
the bleachers at a baseball game and put his hand down her pants,
touching her vagina through her underpants. [Petitioner] took
Brandy's hand and placed it on his penis. She moved to another
part of the bleachers to get away from [petitioner].

10 At the home of Sarah's grandmother, Brandy saw [petitioner] try to
11 force Sarah's mouth open and put his penis in it. On another
12 occasion, Brandy was playing a game with Monopoly money and
13 said to [petitioner], "Look, I have a \$100 bill." [Petitioner] offered
14 to show her a real \$100 bill if she would take off all her clothes.
15 One time when Brandy and Sarah were playing a Nintendo game in
16 the bedroom, [petitioner] came in naked and asked them if they
17 wanted to touch his penis. Brandy refused, but Sarah touched it.
18 Brandy did not immediately tell anyone about these incidents
19 because she was scared [petitioner] would hurt her.

20 Sarah testified that on two occasions [petitioner] asked Brandy if
21 she wanted to play with or suck his penis. [Petitioner] also asked
22 Sarah to suck his penis and, on one occasion, forced her head down
23 on it. Another time, [petitioner] took her to the garage, laid her
24 down on the Ping-Pong table, and started to put his penis in her
25 mouth. On yet another occasion, [petitioner] asked Sarah to suck
26 his penis, and he held it until he ejaculated. He also masturbated to
ejaculation in the shower once with her. Sarah did not tell any
adult about [petitioner's] actions because he had threatened her and
she was scared of both [petitioner] and her mother.

21 The parties stipulated that [petitioner] was never arrested, charged
22 or brought to court with respect to any of the alleged acts with
23 Brandy and Sarah.

24 (People v. Bristow, slip op. at 7-8.) Petitioner denied that he had ever molested these children.

25 The state appellate court rejected this claim, stating:

26 Here, the principal issue was whether [petitioner's] sexual activity
with the victims was consensual. The evidence of his prior
conduct, although not identical to the present offenses, showed that

1 [petitioner] had forced other young females to perform
2 nonconsensual sex acts, particularly oral copulation. This tended
to show the present offenses were not consensual.

3 The prior offenses were no more inflammatory than the present
4 offenses, which involved a greater degree of brutality and
5 assaultive behavior toward the teenagers. This factor supports
6 introduction of the evidence. [Citations omitted.] It also lessened
7 the likelihood that the jury convicted [petitioner] merely to punish
him for the prior offenses, for which he was not prosecuted.
[Citation omitted.] Moreover, this likelihood was decreased by the
jury instructions, which advised the jury they could not convict
[petitioner] based merely on his prior conduct. [Citation omitted.]

8 Furthermore, the prior acts were not remote, occurring only three
9 years earlier, and the evidence came from an independent source.
10 Both factors favor introduction of the evidence. Lastly, the
11 evidence did not entail an undue consumption of time as the
12 testimony of Brandy and Sarah comprised only 55 pages of the
voluminous report's transcript. [Petitioner] simply denied their
allegations and claimed they arose from difficulties he had with
Sarah's grandmother.

13 Accordingly, even though the prior sex offenses were not identical
14 to the present offenses and [petitioner] was not convicted of
15 committing them, the trial court did not abuse its discretion under
section 352 in admitting the evidence given the number of other
factors favoring admission.

16 (People v. Bristow, slip op. at 20-21.)

17 The question whether evidence of prior uncharged acts was properly admitted
18 under California law is not cognizable in this federal habeas corpus proceeding. Estelle v.
19 McGuire, 502 U.S. at 67. The only question before this court is whether the trial court
20 committed an error that rendered the trial so arbitrary and fundamentally unfair that it violated
21 federal due process. Id. See also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991)
22 ("the issue for us, always, is whether the state proceedings satisfied due process; the presence or
23 absence of a state law violation is largely beside the point"). A writ of habeas corpus will be
24 granted for an erroneous admission of evidence "only where the 'testimony is almost entirely
25 unreliable and . . . the factfinder and the adversary system will not be competent to uncover,
26 recognize, and take due account of its shortcomings.'" Mancuso, 292 F. 3d at 956 (quoting

1 Barefoot v. Estelle, 463 U.S. 880, 899 (1983). Evidence violates due process only if “there are
2 no permissible inferences the jury may draw from the evidence.” Jammal, 926 F. 2d at 920.
3 Even then, evidence must “be of such quality as necessarily prevents a fair trial.” Id. (quoting
4 Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir. 1986)). For purposes of AEDPA, petitioner
5 must demonstrate that the California courts’ rejection of his federal due process claim was
6 contrary to or an unreasonable application of “clearly established Federal law, as determined by
7 the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 538 U.S.
8 63, 70-71 (2003).

9 Petitioner’s trial was not rendered fundamentally unfair because of the admission
10 of evidence of petitioner’s prior uncharged offenses against Sarah and Brandy. The trial court
11 took care in considering this evidence. The trial court held a lengthy in limine hearing on the
12 motion to admit the uncharged offense evidence. (RT 99-153; 175-80.) The trial court issued its
13 tentative ruling allowing the admission of the uncharged offense evidence on January 8, 1997.
14 (RT 177.) On January 16, 1997, the trial court issued its detailed ruling that granted admission of
15 the uncharged offense evidence. (RT 363-448.)

16 As noted by the state trial court, the other incidents testified to by Sarah and
17 Brandy were no more inflammatory than the circumstances of the charged crimes – in fact, they
18 were decidedly less inflammatory. The trial judge cited Lyndsay’s fear that petitioner was going
19 to kill her. (RT 376.) The prolonged sexual assault of the bound teenaged victim was more
20 inflammatory than the prior molestations reported by Brandy and Sarah. In addition, the prior
21 uncharged offense evidence was not unreliable. The trial court took judicial notice of the
22 juvenile court’s findings in a prior case, in which both Brandy and Sarah had testified under oath,
23 and noted that whether the juvenile court found by a preponderance of the evidence or by clear
24 and convincing evidence, the juvenile court found the molestation allegations to be true. (RT
25 445.) The prior uncharged offense evidence also concerned events that were not too remote in
26 time to the charged acts.

Moreover, evidence of these uncharged acts was also admissible to show petitioner's intent and propensity to have sex with female children, and to negate the defense of perceived consent. These are rational inferences the jury could draw from the challenged evidence that are not constitutionally impermissible.

Finally, the uncharged offense evidence was probative of the victims' credibility. Both victims were "basically living on the streets" (RT 145) at the time of the crimes. Lyndsay was impeached with two prior convictions. The trial judge allowed the defense to elicit the fact that both Lyndsay and Crina had previously been involved in ganking.² Lyndsay and Crina had lived a lifestyle a jury might not approve (RT 145-46), which could have affected the jury's assessment of the victims' credibility.

The United States Supreme Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes." Garceau v. Woodford, 275 F.3d 769, 774 (9th Cir. 2001), overruled on other grounds by Woodford v. Garceau, 538 U.S. 202 (2003). In fact, the Supreme Court has expressly left open this question. See Estelle v. McGuire, 502 U.S. at 75 n.5 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"). Thus, petitioner's claim that California Evidence Code § 1108 violates due process by allowing admission of evidence of prior sexual crimes solely for the purpose of proving disposition to

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² The trial judge admitted this evidence because it was not prohibited under California Evidence Code § 782 (prior sexual conduct of complaining witness) since it involved *not* performing agreed-upon sexual acts. (RT 192.)

1 commit the present offense is unavailing. Accordingly, the state court's decision with respect to
 2 this claim was not contrary to United States Supreme Court precedent.³

3 Further, any error in admitting this testimony did not have "a substantial and
 4 injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637. See also
 5 Penry v. Johnson, 532 U.S. 782, 793-96 (2001). There was direct evidence separate from the
 6 propensity evidence that petitioner committed the crimes charged in the instant action. Both
 7 Crina and Lyndsay testified as to the events of that night.

8 In addition, Rafael Trujillo, Crina's neighbor, testified concerning Crina's
 9 appearance at his door. (RT 685.) He testified that Crina's hands were tied behind her back and
 10 that her mouth was taped shut by tape wound all the way around her head. (RT 686-87.) Trujillo
 11 testified that Crina looked frightened, nervous and desperate. (RT 689.) Once released from her
 12 bonds, Crina testified she went to the Star Market and called police. (RT 1080-81.) When police
 13 arrived, Crina reported what happened and told the police she had written down petitioner's truck
 14 license number in the laundry room. (RT 480, 484.) Officer Nies obtained the number from the
 15 laundry room, called it into police dispatch, and then went to the address once dispatch relayed
 16 the address from its records search. (RT 481-82.)

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 19 ³ California Evidence Code § 352 provided an adequate safeguard because under the
 20 AEDPA, state court findings of fact are presumed correct unless petitioner rebuts the
 21 presumption with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Here, the state
 22 trial court noted that, although the uncharged offense evidence was prejudicial, it was probative
 23 and relative because of its similarities to the instant action: (1) force (even though of different
 24 degree); (2) threat to injury victim in the future; (3) manual manipulation of penis; (4) manual
 25 contact with vaginal area; (5) oral copulation was major sex act in all offenses; (6) sex for pay
 26 (alleged ganking vs. alleged request of Brandy to disrobe for \$100 bill); (7) all offenses involved
 children (Lyndsay was 16 at time of alleged offense; Brandy was 10 and Sarah was 7 at time of
 uncharged offenses); (8) all offenses involved females; and (9) trial judge found similarities in
 appearance of Lyndsay and Sarah (hair color, etc.). (RT 372-73.) The trial court found that the
 evidence came from an independent source, which enhanced its probative value. (RT 374.) The
 trial court also found that the uncharged offense evidence was not unduly inflammatory and was
 not too remote in time. (RT 375-76.) The trial court's decision that the probative value of the
 evidence outweighed its prejudicial effect was not "an objectively unreasonable determination of
 the facts." 28 U.S.C. § 2254(d)(2).

1 Lyndsay was found bound and gagged and buried under a tent held down by old
2 tires. (RT 513.) Officer Cunningham testified that tape was tightly bound around Lyndsay's
3 throat. (RT 521.) There were wraps of black electrical tape around her eyes. (RT 520.) Officer
4 Cunningham stated there was a "cloth gag in her mouth that was taped to her face with black
5 electrical tape." (RT 519.) Officer Cunningham testified that he felt it was a danger to
6 Lyndsay's welfare to be taped up that tight, especially in the position she was in (hogtied,⁴ laying
7 face down on the ground). (RT 521, 514, 534.) Officer Manetti testified that the wires tying her
8 wrists and ankles were so tight he was afraid to use a knife to cut the wire because it might cut
9 her skin, choosing instead to untie the knots. (RT 1242-43.) Officer Manetti did use a knife to
10 cut the wire that connected her wrists to her ankles. (RT 1243.)

11 These facts were sufficient to persuade a jury that Lyndsay was credible and that
12 petitioner's defense that she was a prostitute who had consented to the sex acts was unavailing.

13 Moreover, any threat of improper prejudice flowing from the testimony was
14 mitigated by the trial court's instruction directing the jury to consider the uncharged acts
15 testimony only as it was relevant to show petitioner "has a general character trait to predispose
16 him to commit the types of crimes alleged in this case, . . . the existence of a necessary specific
17 intent element, or . . . [that petitioner] did not reasonably and in good faith believe that the person
18 with whom he engaged or attempted to engage in a sexual act consented to such conduct." (CT
19 325; RT 1813-14.) The jury was specifically instructed that they were not to find petitioner
20 guilty of any or all charges in this case just because they believed he had committed a prior
21 sexual offense or offenses or that he had a character trait that predisposed him to the commission
22 of such offenses. (RT 1814-15.) The jury was also told that the prior conduct was not sufficient
23 by itself to prove guilt, and that its weight and significance, if any, were matters for the jury's
24 determination. (RT 1815.) The jury is presumed to have followed these instructions. Old Chief

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26 ⁴ Officer Cunningham explained to the jury that hogtied meant that the hands were tied
behind one's back and then the feet were brought up and tied to the hands. (RT 524.)

1 v. United States, 519 U.S. 172, 196-97 (1997); United States v. Reed, 147 F.3d 1178, 1180 (9th
2 Cir. 1998).

3 To the extent that petitioner maintains that the admission of this uncharged
4 offense evidence violated the Ex Post Facto Clause, his claim also fails. The U.S. Constitution
5 provides that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing
6 the Obligation of Contracts. . . ." U.S. Const., Art. I, § 10. In Calder v. Bull, 3 U.S. (3 Dall.) 386,
7 390 (1798), Justice Chase gave the classic description of ex post facto laws:

8 I will state what laws I consider *ex post facto* laws, within the
9 words and intent of the prohibition. 1st. Every law that makes
10 an action done before the passing of the law, and which was
11 innocent when done, criminal; and punishes such action. 2d.
12 Every law that aggravates a crime, or makes it greater than it
13 was, when committed. 3rd. Every law that changes the
14 punishment, and inflicts a greater punishment, than the law
15 annexed to the crime, when committed. 4th. Every law that
16 alters the legal rules of evidence, and receives less, or different
17 testimony, than the law required at the time of the commission of
18 the offence, in order to convict the offender.

14 3 Dall. at 390. The fourth Calder category is at issue here. Despite some earlier case law
15 suggesting otherwise, the fourth category is still valid. Carmell v. Texas, 529 U.S. 513, 537-39
16 (2000).

17 The fourth Calder category prohibits both laws that lower the burden of proof and
18 laws that reduce the quantum of evidence necessary to meet that burden. Cf. Carmell, 529 U.S.
19 at 541. However, that does not mean that a state may not change any evidence laws. For
20 example, a change in a witness competency rule did not violate the Ex Post Facto Clause; the
21 changed rule did not always run in favor of the state and did not necessarily affect, let alone
22 subvert, the presumption of innocence. See Carmell, 529 U.S. at 533 n.23, 546. "The issue of
23 the admissibility of evidence is simply different from the question whether the properly admitted
24 evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the
25 general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained." Id. at
26 546; see also Hopt v. Territory of Utah, 110 U.S. 574, 589-90 (1883).

1 Even assuming § 1108 was enacted after the uncharged offenses occurred, it did
2 not lower the burden of proof for the prosecution and did not change the quantum of evidence
3 necessary to convict, particularly in light of the jury instruction set forth above. The statute
4 permitted the jury to consider additional relevant evidence that was not excluded under § 352 in
5 determining whether the prosecution had met its burden of proof. Petitioner has not shown that
6 § 1108 on its face or as applied in his case altered the burden of proof of the amount of evidence
7 necessary to convict. Section 1108 changed evidence admissibility rules, but that was
8 permissible under Carmell and did not run afoul of the Ex Post Facto Clause.

9 Accordingly, for all of these reasons, petitioner is not entitled to relief on his first
10 claim.

11 B. Failure to Grant New Trial Based on Juror Misconduct

12 Petitioner alleges the trial court abused its discretion by failing to grant petitioner
13 a new trial due to juror misconduct in violation of his due process rights.

14 The state appellate court fairly described the facts surrounding this claim as
15 follows:

16 [Petitioner] moved for a new trial based upon a letter the trial court
17 received from Juror No. 8, one month following the verdict. In her
letter, Juror No. 8 alleged the following:

18 She did not believe [petitioner] was guilty, but she
19 was coerced, threatened, and intimidated by the
other jurors into voting for guilt. They caused her
20 to cry on two different days. The foreperson, Juror
No. 11, advised her that she should talk to the judge
21 and ask to be replaced if she did not agree with the
rest of the jurors. Every day she was questioned
22 repeatedly regarding how she could conclude
[petitioner] was not guilty. Before entering the
court to deliver the verdict, the other jurors told her
23 she better not change her mind or the judge would
get mad and make them deliberate some more. She
24 had hoped that, when the judge polled the jury, he
would notice how upset she was and question her
25 again whether it was her true verdict. After the
verdict, one of the male jurors put his arm around
26 her and walked her to her car so she could not talk

1 to anyone. Some of the other jurors did not take the
2 matter seriously and were biased because they had
3 teenage daughters.

4 In an affidavit submitted with the motion for new trial, Juror No. 8
5 reiterated the majority of her claims, alleging she was yelled at,
6 harassed, and felt physically threatened. She added that, on the
7 third or fourth day of deliberations, a male juror escorted her to
8 lunch and discussed the case with her, trying to get her to agree
9 with the other jurors. He did not convince her to change her vote.

10 [Petitioner] moved for a new trial on the grounds that the jury had
11 committed misconduct by harassing and intimidating Juror No. 8,
12 and there had been improper private discussion about the case
13 outside of deliberations.

14 In opposing the motion, the prosecutor submitted affidavits from
15 two jurors, who denied that any coercion, intimidation, yelling or
16 insults had occurred. Rather, they declared: Juror No. 8
17 continually resisted the evidence, could not put aside her personal
18 feelings, and initially refrained from discussing the evidence until
19 she was persuaded to participate. The jurors carefully explained
20 each piece of evidence to Juror No. 8 and handled her with "kid
21 gloves." Juror No. 8 got into a verbal altercation with one of the
22 male jurors early in the deliberations, when she accused him of
23 being closed minded and too quick to convict.

24 The trial court ruled Juror No. 8's letter was inadmissible because it
25 was not written under oath, but could be considered for
26 impeachment purposes to the extent it was inconsistent with her
27 affidavit. The court also ruled that various statements by the jurors
28 were inadmissible to the extent they reflected their thought
29 processes.

30 From the admissible evidence, the trial court concluded: Juror No.
31 8 presented no evidence of objective conduct which demonstrated
32 that she had been threatened or harassed; she simply had been
33 pressed into giving and supporting her opinion, which is typical of
34 normal deliberations and is not misconduct. Juror No. 8 had
35 numerous opportunities to talk to the court if there were problems
36 during deliberations, but she did not do so.

37 As for the lunchtime conversation, the trial court found the
38 allegation was not credible. The court pointed out: Juror No. 8 did
39 not mention the conversation in her letter, even though she must
40 have known the incident was an obvious violation of the
41 admonition given by the court. Her affidavit about the incident
42 was devoid of facts such as the identity of the juror and the details
43 of the conversation. Moreover, she did not raise any alleged
44 misconduct until after she had conversed with [petitioner's] family
45 and visited [petitioner] in jail. From these facts, the court inferred

1 the event did not occur. In any event, the court concluded that,
2 even assuming the lunchtime conversation did occur, it was not
3 prejudicial because Juror No. 8 admitted she did not change her
4 vote because of the conversation.

5 (People v. Bristow, slip op. at 13-15.)

6 The state appellate court rejected petitioner's jury misconduct claim, finding that
7 the trial court's factual finding that the alleged lunchtime discussion did not occur was supported
8 by the sound reasons articulated by the trial court. (Id. at 16.) The appellate court further found
9 that the trial court reasonably concluded petitioner failed to establish objective evidence of
10 harassment and intimidation because petitioner only presented Juror No. 8's conclusory
11 assertions about being intimidated, without any supporting conduct by other jurors. (Id.) The
12 appellate court noted that Juror No. 8 "did not describe any exceptionally harsh outbursts or
13 threatening physical conduct." (Id.)

14 The appellate court found that the fact that Juror No. 8 felt intimidated and
15 consequently voted for guilt only demonstrated her mental processes and subjective
16 considerations which influenced the verdict, which were inadmissible. (Id.) "To permit inquiry
17 as to the validity of a verdict based upon the demeanor, eccentricities or personalities of
18 individual jurors would deprive the jury room of its inherent quality of free expression." (Id., at
19 16-17, citations omitted.) The appellate court concluded that the absence of details in Juror No.
20 8's affidavit, her failure to apprise the court during deliberations of any inappropriate behavior,
21 and her failure to speak up when individually polled, justified the trial court's conclusion that no
22 juror misconduct occurred. (Id. at 17.)

23 The appellate court further found that the trial court did not err by failing to have
24 an evidentiary hearing to obtain more details from Juror No. 8. (Id. at 17.) The appellate court
25 concluded that "[b]ecause Juror No. 8's affidavit did not present sufficient, admissible, credible
26 evidence demonstrating a strong possibility that prejudicial jury misconduct occurred, the trial

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1 court did not abuse its discretion in resolving disputed factual questions without conducting a full
2 evidentiary hearing.” (Id. at 18.)

3 Affidavits and statements by jurors may not ordinarily be used to impeach a
4 verdict once the jury has been discharged unless extraneous influence has invaded the jury room.
5 McDonald and United States Fidelity and Guaranty Company v. Pless, 238 U.S. 264, 267-69
6 (1915); Mattox v. United States, 146 U.S. 140, 148-49 (1892). In consonance with this principle,
7 Rule 606(b) of the Federal Rules of Evidence⁵ prohibits the use of a juror's affidavit to impeach a
8 verdict except with respect to extraneous prejudicial information or outside influence:

9 Upon an inquiry into the validity of a verdict or indictment, a juror
10 may not testify as to any matter or statement occurring during the
11 course of the jury’s deliberations or to the effect of anything upon
12 that or any other juror’s mind or emotions as influencing the juror
13 to assent to or dissent from the verdict or indictment or concerning
14 the juror’s mental processes in connection therewith, except that a
15 juror may testify on the question whether extraneous prejudicial
16 information was improperly brought to the jury’s attention or
17 whether any outside influence was improperly brought to bear
18 upon any juror. Nor may a juror’s affidavit or evidence of any
19 statement by the juror concerning matter about which the juror
20 would be precluded from testifying be received for these purposes.

21 Id.

22 The declaration of Juror No. 8 addresses matters which occurred during the course
23 of deliberations and do not involve the jury’s consideration of extrinsic material. In particular,
24 her representations regarding the pressure placed on her by other jurors to vote guilty concern
25 only the deliberations. Accordingly, the court may not consider this affidavit in evaluating the
26 jury misconduct claim. See United States v. Casamayor, 837 F.2d 1509, 1515 (11th Cir. 1988)
27 (“the alleged harassment or intimidation of one juror by another would not be competent
28 evidence to impeach the verdict under Rule 606(b)”; United States v. Barber, 668 F.2d 778, 786-

29 ⁵ The Federal Rules of Evidence apply to habeas corpus proceedings to the extent that the
30 habeas statutes themselves provide no different rule of evidence. Fed. Rules of Evidence, Rule
31 1101(e). There is no habeas evidentiary rule on the subject. Thus, the court looks to Rule 606(b)
32 of the Federal Rules of Evidence.

1 87 (4th Cir. 1982) (evidence that a juror had been threatened by the jury foreman held
2 inadmissible to impeach verdict under Rule 606(b)). See generally United States v. Rutherford,
3 371 F.3d 634, 639 (9th Cir. 2004) (juror discussion of defendant's failure to testify in violation of
4 court's instructions is inadmissible).

5 Petitioner cites Remmer v. United States, 347 U.S. 227, 229-30 (1954) for the
6 proposition that the remedy for alleged juror bias or misconduct is a hearing in which the trial
7 court determines the circumstances of the alleged misconduct, the impact on the jurors, and
8 whether it was prejudicial. However, Remmer involved an alleged incident of juror tampering by
9 a third party, someone not a member of the jury. Jury tampering generally refers to private
10 communications between third persons and jurors. The Supreme Court has held that private
11 communication, contact, or direct or indirect tampering with a juror during a trial about the
12 matter pending before it, "if not made in pursuance of known rules of the court and the
13 instructions and directions of the court made during the trial, with full knowledge of the parties"
14 may result in a due process violation. Remmer, at 229. Juror misconduct, on the other hand,
15 includes activity by members of the jury which is inconsistent with the instructions by the court.

16 The underlying issue in these cases is a defendant's right to a fair and impartial
17 jury. Jury tampering and juror bias present the clearest examples of potentially improper
18 influences upon a jury, while the notion of juror misconduct creates a more difficult extension of
19 the issue. See United States v. Dutkel, 192 F.3d 893, 894-96 (9th Cir. 1999) ("Jury tampering is a
20 much more serious intrusion into the jury's processes [than juror misconduct] and poses an
21 inherently greater risk to the integrity of the verdict.") The decision to conduct a hearing into
22 alleged jury misconduct and to determine its extent and nature is discretionary. United States v.
23 Berry, 627 F.3d 193, 197 (9th Cir. 1980); United States v. Hendrix, 549 F.2d 1225, 1227-28 (9th
24 Cir.), cert. denied, 434 U.S. 818 (1977). Not every allegation of jury misconduct requires a
25 hearing. United States v. Halbert, 712 F.2d 388 (9th Cir. 1983) (no hearing required where trial
26 court knew the scope and nature of extraneous information received by a juror); accord, United

1 States v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988)(upon learning of possible juror
2 misconduct, the trial court must hold a hearing only after finding a reasonable possibility of
3 prejudice). Thus, the trial court did not err by failing to hold an evidentiary hearing on this
4 claim.

5 In accordance with the above, IT IS HEREBY RECOMMENDED that
6 petitioner's application for a writ of habeas corpus be denied.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
12 shall be served and filed within ten days after service of the objections. The parties are advised
13 that failure to file objections within the specified time may waive the right to appeal the District
14 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: May 26, 2005.

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18 UNITED STATES MAGISTRATE JUDGE

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